Supreme Court, U.S.
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No. 94-1664

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

STACEY C. KOON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE LAW ENFORCEMENT LEGAL DEFENSE FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE LAW ENFORCEMENT LEGAL DEFENSE FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The Law Enforcement Legal Defense Fund is a national non-profit public interest law and policy center organized to support law enforcement officials through financial assistance and by promoting public awareness of the role of police and respect for the law enforcement community.

SUMMARY OF ARGUMENT

This case involves the standard by which courts of appeal should review district courts' decisions to depart from the range determined by the Sentencing Guidelines when there are extraordinary circumstances. Congress intended the Sentencing Guidelines to be sufficiently flexible to allow imposition of individualized sentences. Some courts of appeal, however, have strictly reviewed trial courts' discretionary departures. This strict review is contrary to Congressional intent and to the general principles of departure as contained in the Sentencing Guidelines.

ARGUMENT

I. The Sentencing Guidelines Are Intended To Be Flexible And To Provide District Courts Sufficient Discretion To Allow Individualized Sentencing

Congress has set forth basic instructions to guide the Sentencing Commission and the courts in the Sentencing Reform Act of 1984 as amended, 18 U.S.C. § 3551 *et seq.* and 28 U.S.C. § 961 *et seq.* and § 3661. In § 3553(a), Congress describes the goal of contemporary sentencing: "a sentence sufficient, but not greater than necessary, to comply with the purposes" of sentencing. A sentence should be based on "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). One of the statutorily mandated purposes of the guidelines is to:

> [Maintain] sufficient flexibility to permit individualized sentences when warranted by mitigating ... factors not taken into account in the establishment of [the guidelines].

28 U.S.C. § 991(b)(1)(B). The court is instructed to impose a sentence within the range described by the guidelines,

> unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.

18 U.S.C. § 3553(b).

Congress also instructed the Sentencing Commission to consider whether a number of factors are relevant to a defendant's sentence and to take them into account in the sentencing guidelines only to the extent that they are relevant. 28 U.S.C. § 994(c),(d). However, in 28 U.S.C. § 994(e), Congress discouraged the Commission from relying on some of these same factors by requiring that the guidelines and policy statements "reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant." Moreover, Congress prohibited the Commission from considering other factors by requiring it to "assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed and socioeconomic status of offenders." 28 U.S.C. 994(d).

Notwithstanding the foregoing limitations, Congress has provided that "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 28 U.S.C. § 3661.

The Congressional intent regarding the role of the sentencing guidelines and judicial discretion was explained as follows in the legislative history:

> The Committee does not intend that the guidelines be imposed in a mechanistic fashion. It believes that the sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case. The purpose of the sentencing guidelines is to provide a structure of evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences.

S. Rep. No. 225, 98th Cong., 2d Sess. 52, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3235.

Although the statutory scheme is complex, it is clear that Congress did not intend the Sentencing Reform Act to relegate sentencing judges to the role of mechanical calculators. Rather, the statute allows judicial consideration of all information concerning the background of a defendant and gives the court discretion to impose a sentence outside the guidelines range in situations where

relevant factors were not adequately reflected in the formulation of the guidelines.[1]

In 1987, the Sentencing Commission introduced the Guidelines, with instructions to courts to view the Guidelines "as carving out a 'heartland'" of typical cases. *See* U.S. Sentencing Commission, Federal Sentencing Guidelines Manual (1987), ch. 1, pt. A, intro. 4(b) ("U.S.S.G."). Departures based on certain factors are expressly forbidden; in other circumstances, departures are encouraged.[2]

The Sentencing Commission provided, without explanation, that sentencing judges should be discouraged from considering factors described in U.S.S.G. § 5H1.1-.11.[3] However, the Sentencing Commission's policy

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[1]The test for guidelines applicability in 18 U.S.C. § 3553(b) focuses not merely on whether the Sentencing Commission considered a factor in formulating the guidelines, but also whether the consideration was adequate. Review of the adequacy of the consideration renders "the Commission accountable with respect to the *quality* of the guideline and assures courts that they need not follow ill-considered limitations on their discretion." *See* Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L.J. 1681, 1699 (June 1992).

[2]For instance, courts may not consider race, sex, national origin, creed, religion, or socio-economic status in sentencing. U.S.S.G. § 5H1.10. U.S.S.G. § 5K lists several considerations that may take a case outside the "heartland" and warrant a departure. For instance, victim misconduct that contributes significantly to provoking the offense may reduce the sentence.

[3]U.S.S.G. § 5H1.1-.11 states that age, education, vocational skills, mental and emotional conditions, physical condition,

[Footnote continued on next page]

statement as to departures indicates that "[t]he controlling decision as to whether and to what extent departure is warranted can only be made by the courts." U.S.S.G. § 5K2.0.

Congress intended the courts to have flexibility to depart from the guidelines when appropriate. The Sentencing Commission's instructions to the courts do not provide an enumeration of all of the possible circumstances that could justify such departures. Thus, the courts have been faced with the task of developing a jurisprudence for the standards governing departure from the guidelines.

II. There Is A Conflict Among The Circuits As To The Appropriate Standard Of Appellate Review Of Downward Departures Under The Sentencing Guidelines

The courts of appeal have diverged in their response to district courts' decisions to depart. Some courts of appeal strictly review district judges' discretionary departures, while other courts of appeal recognize the trial judge's superior feel for the case.

A. The Ninth Circuit's Decision Reflects The Strict *De Novo* Review That is Also Followed in the Third, Fourth, Sixth and Tenth Circuits

In this case, the Ninth Circuit strictly reviewed whether the district court had authority to depart. Although the

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[Footnote continued from previous page]

employment record, family and community ties are "not ordinarily relevant" to sentencing decisions.

court reviewed the district court's factual findings concerning bodily injury for clear error, it reviewed *de novo* the district court's determination of whether the factors used by Judge Davies justified a departure.

With regard to the three level downward departure, the Ninth Circuit ruled that the approach of combining factors to justify a departure was allowed. Pet. App. at 59a. However, the court then reviewed each factor alone, and determined that none of the factors were allowable bases for departure.

First, the Ninth Circuit held that the additional punishment Mr. Koon faced was incorrectly considered because this factor is only allowed where the harm might result from physical characteristics. Here, the additional punishment was based on a threat of physical harm due to the notoriety of the case and on personal and professional consequences. Pet. App. at 59a-66a. Second, the Ninth Circuit held that the fact that Mr. Koon posed no criminal threat in the future should not have been considered as a basis for departing because the Sentencing Guidelines take recidivism into account in the criminal history score. Pet. App. at 67a-68a. Third, the Ninth Circuit held that the "spectre of unfairness" created by successive state and federal prosecutions was not correctly considered because the federal prosecution of Mr. Koon did not violate the Fifth Amendment prohibition against double jeopardy. Pet. App. at 68a-69a.

Thus, although none of these factors is expressly "forbidden" or "discouraged" by the Sentencing Guidelines, the Ninth Circuit held that the district court did not have discretion to consider them based on its own *de novo* review of the appropriateness of their being a factor in departing from the guidelines.

The Ninth Circuit held that even the five-level downward departure based on victim misconduct was disallowed despite the fact that departures for victim misconduct are specifically encouraged by the Guidelines. U.S.S.G. § 5K2.10. The Ninth Circuit, in a somewhat contradictory manner, then pointed out that: "We do not conclude that a departure for victim misconduct would *never* be permissible in a public case." Pet. App. at 76a n.38. By thus holding, it narrowly limited the circumstances which in its opinion would justify a departure to those instances when, for example, a police officer's partner is wounded or killed in his presence. Such a limitation is not contained in U.S.S.G. § 5K2.10 and is contrary to the general principles of departure as contained in the guidelines when a district judge determines that a case is not within the "heartland" of a particular guideline.

Under its *de novo* review, the Ninth Circuit created a new set of forbidden factors, based not on the Sentencing Guidelines, but on its own determination of what should be a factor in the district court's decision whether to depart.

Other circuits have also held that the district court's determination of whether a factor was adequately considered by the Sentencing Commission is subject to *de novo* review. *See*, *United States v. Thomas*, 49 F.3d 253, (6th Cir. 1995) ("A district court's determination that the guidelines adequately account for someone who is HIV positive is a question of interpretation which this court reviews *de novo*."); *United States v. Kohlbach*, 38 F.2d 832 (6th Cir. 1994) (review of sentence involves three-part test: 1) the district court's determination of whether the circumstances justify departure is reviewed *de novo*; 2) the factual findings justifying departure are reviewed under the clearly erroneous standard; and 3) the district court's degree of departure is reviewed for reasonableness); *United*

States v. Tsosie, 14 F.3d 1438 (10th Cir. 1994) (same three part test as in *Kohlbach*); *United States v. Thornburgh*, 7 F.3d 1471, 1473 (10th Cir. 1993) ("We review *de novo* whether the district court relied on an improper factor in deciding to depart."); *United States v. Lieberman*, 971 F.2d 989, 995 (3d Cir. 1992) (court engages in plenary review of district court's determination of whether a circumstance was adequately considered by the Sentencing Commission); *United States v. Diegert*, 916 F.2d 916 (4th Cir. 1990) (whether or not factors are extraordinary is a question of fact to which the clearly erroneous standard applies; whether or not a factor was adequately taken into consideration by the Sentencing Commission is a finding to which the *de novo* standard applies on appeal).

B. The First Circuit's Less Restrictive Standard of Review That Allows District Courts Discretion and Recognizes Their Superior "Feel" for Cases Has Been Adopted or Recognized as Persuasive by the Second, Seventh, Eighth, and District of Columbia Circuits

In *United States v. Rivera*, 994 F.2d 942 (1st Cir. 1993), then Chief Judge Breyer set out a much less strict test for review of district court's departures. The opinion discussed the history of the Sentencing Guidelines and noted that the Guidelines themselves anticipate out of the ordinary cases. When cases are extraordinary, district courts should be allowed to depart, subject only to a reasonableness review. *Id.* at 946.

The First Circuit then described how this analysis applied to the specific categories of departures set forth in the Sentencing Guidelines. *Id.* at 947-49. If the Sentencing Guidelines do not forbid, encourage or discourage consideration of a factor, the First Circuit concluded that the district court must make its best

judgment based on the structure and theory of the Guidelines, as well as the generally relevant sentencing factors and the basic purpose of sentencing:

> Ultimately, however, the Guidelines cannot dictate how courts should sentence in such special, unusual or other-than-ordinary circumstances. And that is as it should be. As we have said ... the very theory of the Guidelines system is that when courts, drawing upon experience and informed judgment in such cases, decide to depart, they will explain their departures. The courts of appeals, and the Sentencing Commission, will examine, and learn from, those reasons. And, the resulting knowledge will help the Commission to change, to refine, and to improve, the Guidelines themselves. That is the theory of partnership that the Guidelines embody.

Id. at 949-50. Unless a district court departs based on a "forbidden" factor, does not explain a departure based on a "discouraged" factor, or must engage in textual analysis of the words of a guideline, appellate courts must defer to the district court's decision, recognizing the district court's "superior 'feel' for the case." *Id.* at 950-51.

Other circuits have followed the *Rivera* "reasonableness" standard for review of district court's discretionary departures. *See United States v. Canoy*, 38 F.3d 893, 908 (7th Cir. 1994) ("when a district court explains the basis for its finding of an extraordinary family circumstance, that finding is entitled to considerable respect on appeal") (citing *Rivera*); *cf.*, *United States v. Kaye*, 23 F.3d 50, 52-53 (2d Cir. 1994) (noting that First Circuit "has adopted a standard of review requiring greater

deference" to district court departures but declining to reconsider *de novo* standard because "even our strict de novo review supports the District Court's departure"); *United States v. Goff*, 20 F.3d 918, 920 n.1 (8th Cir. 1994) (although Eighth Circuit has not adopted the *Rivera* approach, Judge Loken notes that "the author of this opinion agrees with the *Rivera* modification," but also notes it would not change result of the case); *United States v. Simpson*, 7 F.3d 813 (8th Cir. 1993) (pointing to *Rivera* as an "excellent analysis of the statutes and guidelines governing the district court's power to impose a departure from the Guidelines sentence and the appellate court's proper function on review"); *United States v. Spencer*, 25 F.3d 1105 (D.C. Cir. 1994) (pointing to *Rivera* as persuasive argument for the proposition that 18 U.S.C. § 3553(b) and U.S.S.G. § 5K2.0 are not as restrictive as other circuits interpret them).[4]

The *Rivera* standard of review maintains sufficient district court discretion to allow individualized sentencing. As the Supreme Court held in *United States v. Williams*, 112 S. Ct. 1112 (1992), although the Sentencing Reform Act established a limited appellate review of the sentencing decisions, it did not alter a court of appeals' traditional deference to a district court's exercise of its sentencing discretion.

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[4]The Fifth Circuit also applies a form of reasonableness test: "We affirm a departure from the Guidelines if the district court offers acceptable reasons for the departure and the departure is reasonable." *United States v. Ashburn*, 38 F.3d 803, 807 (5th Cir. 1994 (en banc) (internal citations omitted).

III. This Case Is A Suitable One For Resolving The Conflict

This case is representative of the situation faced by district courts when they consider whether a departure is appropriate. In this case, the district court departed downward from a range of 70-87 months to 30 months, based in part on victim misconduct, susceptibility to prison abuse, and loss of tenure and position. Each of these factors have been grounds for departure in other cases.

For example, some circuits have accepted the district court's better feel for the case and affirmed departures based on victim misconduct. *United States v. Yellow Earrings*, 891 F.2d 650, 653 (8th Cir. 1989) (affirming district court's eight-level downward departure based on victim's provocative conduct and rejecting government's arguments to overturn the district court as "border[ing] on the frivolous.")

Departures based on susceptibility to prison abuse have also been affirmed in the appellate courts. *United States v. Gonzalez*, 945 F.2d 525 (2d Cir. 1991) (affirming departure for a defendant who was small, feminine-looking, and had the appearance of a fourteen year old); *United States v. Lara*, 905 F.2d 599 (2d Cir. 1990) (affirming departure for a defendant who was small, appeared immature, and was bisexual leading prison officials to place him in solitary confinement for his own protection). *See also*, *United States v. Adonis*, 744 F. Supp. 336 (D.D.C. 1990) (district court departed downward based on vulnerability to prison abuse due to fact that defendant was mentally retarded and because of his limited intelligence, he was savagely beaten by other inmates). Indeed, the Ninth Circuit itself has implied that a departure based on vulnerability to prison abuse might be appropriate in certain circumstances. *United States v. Martinez-Guerrero*, 987 F.2d 618, 620 (9th Cir. 1993) (extraordinary physical impairment might be basis for departure, but concluding that legal blindness was not such an impairment).

The Ninth Circuit itself accepted a district court's departure based on loss of tenure and position. *See United States v. Aguilar*, 994 F.2d 609 (9th Cir.) (opinion of Judge O'Scannlain), *op. withdrawn*, 11 F.3d 124 (1993), and *op. replaced on reh'g en banc*, 21 F.3d 1475 (1994). Judge O'Scannlain approved the district court's downward departure based on loss of tenure and position, holding that the additional punishment to be imposed on Judge Aguilar was distinguishable from the ordinary "substantial pain and humiliation" suffered by criminal defendants and took the case outside the heartland. As Chief Judge Reinhardt pointed out in his dissent, the en banc court reversed Judge Aguilar's conviction and thus did not reach Judge O'Scannlain's determination of the downward departure.

While the facts of every case are going to be unique, these other cases demonstrate that the departure factors considered by the district court in this case are just the types of factors that district courts face in innumerable sentencing decisions. The lower courts need guidance in knowing whether to depart and what scrutiny is appropriate on appeal.

IV. The Viability Of The Sentencing Reform Act Will Be Threatened If District Judges Are Denied A Reasonable Measure Of Discretion

Many judges and commentators have expressed dissatisfaction with the Sentencing Guidelines.[5] The April 1990 report of the Federal Courts Study Committee found that of 270 respondents, 266 were against and only 4 were in favor of the Guidelines. *Federal Courts Study Comm., Report of the Federal Courts Study Committee* 133-44 (1990).

In a recent study sponsored by the Sentencing Commission itself, district courts expressed their dissatisfaction with the lack of discretion they retain under the Sentencing Guidelines. *U.S. Sentencing Commission, The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining* 101-14 (1991). Of those surveyed, 48% identified reduction of judicial discretion as a problem with the Sentencing

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[5]*See,* e.g., Hon. Jose A. Cabranes, *Sentencing Guidelines: A Failed Utopian Experiment*, Nat'l L. J., July 27, 1992 at 2 (Circuit Judge, United States Court of Appeals for the 2d Circuit); Hon. Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. Cal. L. Rev. 357 (1992) (U.S. District Judge, Eastern District of New York); Judge Vincent L. Broderick, S.D.N.Y. & Judge Mark Wolf, D.Mass., Statement before the U.S. Sentencing Comm'n (March 5, 1991), in 3 Fed. Sentencing Rep. 276 (1991); Judge Edward R. Becker, 3d Cir., Statement to the U.S. Sentencing Comm'n on behalf of the Judicial Conference Comm. on Criminal Law and Probation Admin. (March 1990), in 2 Fed. Sentencing Rep. 238 (1990).

Guidelines.[6] *Id.* at 108. Responses included statements that judges have lost too much discretion under the guidelines, that it is too difficult to depart, or that discretion has been transferred from the judge to the prosecuting attorney or the probation officer. Of the 50 judges, 42% found that the Sentencing Guidelines were either too inflexible, too mechanical, or fail to take into account personal factors and therefore "dehumanize" the sentencing process. *Id.*

There are indications that judges may be finding ways to avoid the Sentencing Guidelines' ranges altogether, either by accepting plea agreements, even if they do not reflect the seriousness of the offense, or by departing in cases where there has been a waiver of appeal. *See* Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L. J. 1681, 1726 (June 1992).

It is therefore important that district courts be given the discretion in sentencing that Congress intended them to have. This case presents the Court with the opportunity to address this important issue and to clarify that appellate courts should engage in only limited review of departure decisions.

Marvin Frankel, the "father" of the Sentencing Guidelines, recently offered the following advice with regard to district court discretion under the Sentencing Guidelines:

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[6]65% of the 54 defense attorneys and 29% of the 66 probation officers surveyed also reported reduced judicial discretion as a problem. *Id.* at 110.

The judges on the firing lines are the ones who will ultimately make or break this effort. Their pressures to depart below the guidelines should be received more hospitably, at least for the time being, by both the Commission and the appellate courts. As I have mentioned, and as scholars have noticed, the courts of appeals have been notably narrow in their allowance of departures. That may be the right approach some day, but it is highly doubtful just now. Both the Commission and the courts of appeals should be responding more positively to the pressures from trial judges to increase their authority to mitigate.

As a compromise, my suggestion is ultimately that the power to depart *below the guidelines* ought to be more generously measured, certainly in the early years of the experiment. There is an ancient principle - not yet overruled, and I hope never to be overruled - that doubts in matters of criminal law ought to be resolved with a disposition toward lenity. That disposition is not rampant these days - with all the voices in the streets and on the bench shouting for the death penalty and other useless weapons in the war on crime. But it remains a fair and appropriate legal principle for the dark subject of crime and punishment. Mitigating departures ought to be presumed to be valid.

Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 Yale L J 2043, 2050-51 (June 1992).

The Supreme Court should address the strict standard of review that the Ninth Circuit and other courts of appeal have applied to district court decisions to depart. This standard is contrary to Congressional intent and the statutory purposes of the Sentencing Reform Act, which was meant to provide discretion to trial judges. Moreover, by strictly reviewing district courts' discretionary departures, courts of appeal deny the Sentencing Commission the valuable information and insight of trial judges who are "on the firing lines" and who may have a better "feel" for the unique circumstances of the cases before them.

CONCLUSION

For the reasons stated in this brief, the Court should grant the petition for certiorari, reverse the judgment of the Court of Appeals, and reinstate the sentence imposed by the District Court.

Respectfully submitted,

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